No. 80-892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GAF CORPORATION,

Petitioner,

—VS.—

JAMES K.J. CHENG,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

I.

Whether a question of sufficient seriousness is presented by the decision (based on long-standing precedent)

of the Court of Appeals for the Second Circuit (first by a three-judge panel and second by an en banc dismissal) to disqualify a small private law firm which represented defendant in a pending employment discrimination case and which hired an attorney who, while working at a very small legal services office, (1) was introduced to the plaintiff as one of the lawyers in that office and (2) engaged in privileged and confidential discussions of strategy, conduct and tactics about the plaintiff and his case.

II.

Whether the decision of the Court of Appeals in this case in fact conflicts with the rationale of its decision in Armstrong v. McAlpin.

III.

Whether the Court of Appeals was correct in deciding the merits of this case after it had been fully briefed and argued and was sub judice by a Second Circuit panel prior to the wholly prospective ruling in Armstrong v. McAlpin.

COUNTERSTATEMENT OF THE CASE

From October 22, 1974 until October 19, 1979, Philip Gassel was employed as an attorney at Legal Services for the Elderly Poor ("LSEP"), attorneys for plaintiff-respondent James K.J. Cheng ("Cheng") in this action. Upon termination of his employment at LSEP, Mr. Gassel, while in possession of confidential and privileged information about Cheng's case, joined the firm of Epstein, Becker, Borsody & Green (the "Epstein firm"), which represents defendant-petitioner GAF Corporation in the very same action. Additional information regarding this case is contained in the petition for a writ of certiorari filed by GAF Corporation.

Three critical facts were, however, ignored or obscured in petitioner's statement of the case. First, petitioner inaccurately asserts that Mr. Gassel did not represent Cheng in any capacity prior to joining the Epstein firm. Although it is true that Mr. Gassel did not conduct research, prepare legal documents or appear in

court on behalf of Cheng, he was one of only four to six attorneys in a small, intimate legal services office, was introduced to Cheng as a member of such office and was present at and participated in several discussions with other LSEP attorneys and law students regarding the conduct of Cheng's case. Mr. Gassel also discussed with Jonathan Weiss, Director of LSEP, various communications of Mr. Cheng to Mr. Weiss. Mr. Gassel, as a staff attorney in a small office, thus represented Cheng and possessed actual knowledge of confidential and privileged information relating to Cheng's case at the time he left LSEP to join the Epstein firm in 1979.

Second, the Epstein firm is itself a relatively small office. Although petitioner's affidavits and briefs repeatedly cite the number of attorneys as being 35, a careful reading of the record indicates that only 60%, or approximately 21 attorneys, actually worked in the New York (as opposed to the Washington D.C.) office of the Epstein firm when Mr. Gassel joined it in 1979. The dangers of inadvertent

disclosure in an office of such size are particularly great, regardless of any formal division into "departments."

Third, petitioner erroneously states as an undisputed fact that "Gassel has not been privy to any discussions regarding tactics or strategy of the case while at the Epstein firm." In a conversation with Cheng's attorney subsequent to the filing of the notice of motion below, however, Mr. Gassel informed Mr. Weiss of communications he had received from his new law firm regarding "their attitude towards settlement in this case after he joined the firm and their attitude towards the subject Motion." Supplemental Affidavit of Jonathan A. Weiss, dated February 25, 1980, paragraph 2. Mr. Gassel denies making such statements to Mr. Weiss. Supplemental Affidavit of Philip Gassel, dated February 27, 1980, paragraph 2.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS PROPERLY APPLIED LONG-STANDING PRINCIPLES OF LEGAL ETHICS TO THE PARTICULAR FACTS OF THIS CASE; THEREFORE, ITS DECISION DOES NOT MERIT DISCRETIONARY REVIEW BY THIS COURT.

In reversing the District Court's denial of Cheng's motion to disqualify the Epstein firm, the Court of Appeals grounded its decision on a long line of established precedents in the Second Circuit and on long-standing principles of legal ethics. Concluding first that "there is ample support for Judge Owen's assumption [in the District Court below] that Gassel had been privy to Cheng's confidences" (A-10),* the Court of Appeals held that under Canon 4 of the American Bar Association's Code of Professional Responsibility (the "Code"),** Gassel would be disqualified

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* Refers to page numbers of the Appendix to the Petition for a Writ of Certiorari filed by GAF Corporation.

** Canon 4 provides that "A Lawyer Should Preserve the Confidences and Secrets of a Client."

from representing GAF Corporation in the Cheng case. This holding is clearly correct. See, e.g., Government of India v. Cook Industries, Inc., 569 F.2d 737 (2d Cir. 1978); Emle Industries v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973); Consolidated Theatres v. Warner Brothers Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954); T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953).

Having concluded that Gassel individually was disqualified, the appellate court then held that the entire Epstein firm should also be disqualified under the clear directive of Disciplinary Rule 5-105(D) of the Code.* Emphasizing the relatively small size of the Epstein firm and the fact that "[t]he matter involved in [Gassel's] prior exposure to Cheng while at LSEP is still being

* DR 5-105(D) provides: "If a lawyer is required to decline employment or withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

actively pursued by attorneys for GAF at the Epstein firm," the Court properly found that the Epstein firm's efforts to "screen" Mr. Gassel from this case were inadequate to overcome the "continuing danger that Gassel may unintentionally transmit information he gained through his prior association with Cheng during his day-to-day contact with defense counsel." (A-12)

The Court of Appeal's refusal to accept petitioner's "Chinese Wall" defense is also solidly grounded in existing precedent. See, e.g., Fund of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225 (2d Cir. 1977); NCK Organization Ltd. v. Bregman, 542 F.2d 128 (2d Cir. 1976); Hull v. Celanese Corp., 513 F.2d 568 (1975); W.E. Bassett Co. v. H.C. Cook Co., 201 F. Supp. 821 (D. Conn. 1962), aff'd, 302 F.2d 268 (2d Cir.). Petitioner seeks to avoid the implications of this fact by attempting a mistaken analogy between legal services attorneys and government attorneys and by erroneously implying that the outcome of this case would be different if the Armstrong v. McAlpin decision below were applied to this case.

In fact, legal services offices such as LSEP are far more closely analogous to private firms than to government agencies. Like private firms, legal services offices vary widely in size from small, intimate offices the size of LSEP to large neighborhood offices with numerous departments. Like attorneys at private firms, legal services lawyers receive their funding from a number of sources, on a contract basis. Although the federal government provides a large proportion of such funding, the government in no way controls the cases or the conduct of the legal services offices which it helps to fund. Finally, like attorneys at private firms, attorneys at legal services offices are not subject to the special disciplinary rule, DR 9-101(B), in the Code governing the conduct of government attorneys.

By contrast to the numerous reported cases involving motions to disqualify former government employees, the instant case marks the first disqualification of which respondent is aware of an entire firm because of the conflict of interest created by a legal

services attorney moving to a private firm during a pending case. The LSEP office alone has employed over 30 law students and lawyers who have subsequently gone into private practice. Not one of these departures resulted in a motion for disqualification until this case. The same is true of the use of pro bono volunteers by LSEP -- not one volunteer at LSEP has yet been the focus of a disqualification motion.

The petitioner has thus baldly asserted, without supporting evidence, a potential future problem arising from the application of cases and principles which in fact have been in existence for many years -- with no apparent untoward effects on the ability of legal services offices to recruit competent attorneys. It is in fact the failure of the Epstein firm to comply with those long-standing cases and principles which has caused their current distress, not any new and onerous burdens imposed by the Court of Appeals. Having simply applied existing law to the facts of this case, the Second Circuit has reached a proper result which in no way fits this Court's criteria for

discretionary review.

II

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE RATIONALE OF ITS DECISION IN ARMSTRONG V. McALPIN

Contrary to petitioner's assertions, the decision in this case does not conflict with the prior en banc decision of the Court of Appeals in Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980. The Court of Appeals in this case did not "revert" to a "strict and prophylactic application" of the Code, but rather focused -- as it has long done -- on the integrity of the trial process. In so doing, the court found that "[u]nlike many disqualification motions that appear before this Court," this case presents a "continuing danger" of inadvertent disclosure of confidential information. (A-12).

Moreover, the Court of Appeals itself correctly distinguished the Armstrong case. In Armstrong (in contrast to this case), for example, the court found there would not be any threat of taint of the underlying trial, and there would be extreme hardship to the client resulting from

disqualification under the particular facts of that case. (A-12, n. 7). At the same time, the Court found strong public policy reasons in Armstrong weighing against disqualification, while finding no public policy reasons as compelling in the instant case (presumably for the reasons set forth in Section I above). In Armstrong, finally, the tainted attorney's former employer consented to the representation by the attorney's new firm, whereas LSEP and Cheng have repeatedly objected to the Epstein firm's continued representation of GAF Corporation in this action.

III

THERE IS NO CONFLICT BETWEEN THE CIRCUITS OF SUFFICIENT IMPORTANCE TO MERIT REVIEW OF THIS CASE.

Petitioner finally raises the argument that the Court of Appeals' decision (implicitly affirmed en banc) to reach the merits of this case, despite its prospective ruling in Armstrong that orders denying motions to disqualify would henceforth not be immediately appealable, conflicts with a decision in the Third Circuit in

which the Court of Appeals refused to reach the merits in a disqualification case and simply dismissed the appeal for want of jurisdiction. P. Stone, Inc. v. Koppers Corp., 1980-81 Trade Cas. ¶63,572 (3d Cir. 1980).

The state of the law in the Third Circuit with respect to the question of the appealability of denials of motions to disqualify appears, however, to have been more uncertain than in the Second Circuit, thereby creating fewer problems of reliance by litigants on existing precedents. Moreover, the Court in Stone found no evidence of any actual or potential harms which could not be vindicated on appeal from final judgment, whereas in this case the Court found the existence of a continuing danger that confidential information might be inadvertently disclosed, thereby tainting the underlying trial (and, in effect, any subsequent retrials of the case).

Given the clear permissibility of prospective rulings in appropriate cases, the decision of the appellate court in this case to reach the merits

rather than to cause a "needless waste of both judicial and private resources" by dismissal is clearly correct and does not pose a sufficiently serious conflict with the Stone decision in the Third Circuit to merit discretionary review by this Court.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the petition for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Second Circuit in this case be denied in all respects.

Respectfully submitted,

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